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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re J.J., a Person Coming Under the Juvenile Court Law.	B270248
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. TARA J., Defendant and Appellant.	(Los Angeles County Super. Ct. No. CK98845)

APPEAL from an order of the Superior Court of Los Angeles County. Steven R. Klaif, Referee. Reversed and remanded.

Donna B. Kaiser, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, Kim Nemoy, Principal Deputy County Counsel, for Plaintiff and Respondent.

Tara J. (mother) appeals from an order terminating her parental rights over her son, J.J. Mother argues: (1) the juvenile court abused its discretion when, at the Welfare and Institutions Code section 366.26 hearing,[1] the court denied her request for a continuance so that she could procure evidence to support the application of the "sibling relationship" exception to termination of parental rights; (2) the trial court erred in failing to apply the exception; and (3) notice required under the Indian Child Welfare Act, 25 U.S.C. § 1901, et seq. (ICWA), was incomplete, requiring reversal. We conditionally reverse the order terminating parental rights to allow for proper ICWA notice, and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Los Angeles County Department of Children and Family Services (DCFS) detained one-year-old J.J. at the end of March 2013, after mother and father (Edward M.) were found in an apartment along with drug paraphernalia within reach of the children in the residence. Mother admitted she had recently used methamphetamine and acknowledged she needed help because of her drug addiction. Father also admitted drug use and declared he was a drug addict. J.J. was placed with his paternal grandmother.

Mother has two older daughters. At the time of J.J.'s detention, the girls were 7 and 9 years old. In 2009, the maternal grandmother became the girls' legal guardian after mother realized she could not adequately care for them and relinquished custody.

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise noted.

In April 2013, DCFS filed a dependency petition alleging mother and father had long histories of illicit drug use, their recent use of methamphetamine rendered them periodically unable or incapable of providing regular care of J.J., and their drug use placed J.J. at risk of harm. Mother submitted on the petition, which was sustained, as amended, in June 2013.

Over the next year, mother partially complied with the case plan, but had numerous positive or "no show" drug tests. She enrolled in an inpatient substance abuse program in July 2014. In August 2014, the juvenile court terminated mother's reunification services and set a hearing for selection of a permanent plan, pursuant to section 366.26, for December 2, 2014. Meanwhile, J.J. was thriving in the paternal grandmother's home.

The section 366.26 hearing was continued several times at the request of DCFS because of the lack of a completed adoption homestudy. In February 2015, mother filed a petition for change of court order pursuant to section 388. Mother informed the court she had completed a drug treatment program, she had clean drug tests, and she was attending weekly "CA, NA, [and] AA" meetings. Mother requested that the court allow her further reunification services. She indicated the paternal grandmother would disagree with the request because they did not get along and, according to mother, the paternal grandmother had never liked her.

In an accompanying letter, mother wrote: "I have a great relationship with my daughters today and they really miss [their] brother. My kids deserve to be together. I'm also asking that you please don't separate my children, that if my parental rights are terminated please don't take my daughters' rights to see their

brother. I'm also asking because if my mother in law adopts my son she plans on never letting my side of the family be in his life anymore. His sisters and [maternal grandmother] are a big part of his life and has lived with them since he was born." The juvenile court denied the petition.

In a December 1, 2015 interim review report, DCFS indicated J.J. continued to thrive with the paternal grandmother. The report noted J.J. had been able to visit with his parents and family members from the paternal and maternal sides of the family. At a hearing on the same date, DCFS reported the adoption homestudy was completed. Mother and father asked to set the matter for a contested hearing. The matter was set for January 11, 2016. On that date, father was in custody and not present. The juvenile court granted a two-day continuance so that father could be present at the hearing. When ordering mother to return for the continued hearing, the court stated: "As I indicated, the recommendation is to terminate parental rights."

On January 13, 2016, mother filed another section 388 petition. Mother reported that in addition to completing a drug treatment program in January 2015, she now had a sponsor with whom she met every week. She also attended NA meetings at least three times each week. Mother requested that the court order reunification services and allow her unmonitored visits. She indicated J.J. was bonded to her and called her "mommy"; he was excited to see her during visits and sad when visits ended. She further added: "[M]y son visits with his two older siblings every other weekend. He is happy and looks forward to . . . these visits."

The juvenile court denied the section 388 petition without a hearing. At the beginning of the section 366.26 hearing, mother requested a continuance. Mother's counsel explained: "Mother feels . . . that she would like to have a continuance because she believes there may be an exception . . . pursuant to . . . 366.26(c)(1)(B)(v). . . . She indicates there are two siblings [M.J.] and [M.R.] who have regular and consistent contact with [J.J.] through visitation and it would be detrimental to interfere with the child sibling relationship. An adoption would interfere with that sibling relationship."

Counsel for J.J. and DCFS objected to the request for a continuance. DCFS's counsel argued no good cause had been stated. Mother's counsel explained mother was requesting a continuance to have an opportunity to show the siblings had a "significant close bond." The court denied the request, stating: "Mother can have that opportunity today. This is not something that mother first became aware of and not—everybody is aware of siblings. And if you want mother to either make your argument on that behalf or have her testify, you're free to do so but the continuance request is denied."

J.J.'s counsel objected, asserting mother did not have standing "to make that argument." The court responded: "You know what, I think you are probably correct. Mother wants to address the court on that, I'll allow her to address the court."

Mother's counsel proceeded to offer stipulated testimony from mother regarding two exceptions to termination of parental rights. As to the sibling relationship exception, counsel explained: "[M]other would testify that [J.J.] does have a relationship with [M.J.] and [M.R.], who are two siblings in the care of their maternal grandmother, my client's mother . . . who

has temporary legal guardianship of them. . . . [J.J.] visits with [M.J. and M.R.] every other weekend for a period of up to eight hours every other Saturday, that they do have a close bond all of the children. If mother was called to testify that's what she would testify to."

The juvenile court concluded the sibling relationship exception did not apply: "[T]here's a minimal showing that there's a relationship with these children, based on mother's stipulated testimony with the siblings. Even if mother did have standing to raise this, which is questionable, but assuming she did, there's not a showing that the relationship with these children—these siblings is to a degree that it would outweigh the children's need for permanence."

The juvenile court terminated mother's parental rights. Mother's appeal followed.

DISCUSSION

I. The Juvenile Court Did Not Abuse its Discretion in Denying Mother's Request for a Continuance

Mother argues the juvenile court erred in denying her request for a continuance so that she could procure and present evidence to establish the court should not terminate her parental rights under the section 366.26, subdivision (c)(1)(B)(v) sibling relationship exception. We disagree.

As an initial matter, mother contends, in part, that the juvenile court denied her request for a continuance because it failed to understand she had standing to assert the sibling relationship exception to termination of parental rights. The record does not support this contention. The juvenile court indicated it was denying the request for a continuance *before* J.J.'s counsel objected, incorrectly, that mother had no standing

to make the sibling relationship argument. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 951 [parents have standing to raise sibling relationship exception].) We acknowledge that following the objection, the court stated J.J.'s counsel was "probably right" and later noted that whether mother had standing was "questionable." However, it is clear the court still considered the exception based on mother's stipulated testimony and counsel's argument, then rejected mother's argument on the merits. Thus, we find no basis to conclude the juvenile court erred because it incorrectly determined mother had no standing to raise the sibling relationship exception.

The remainder of mother's argument is that the juvenile court denied her a fair opportunity to defend her parental rights when it denied her request for a continuance. We disagree.

" 'Although continuances are discouraged in dependency cases' [citation], the juvenile court has authority to grant brief, necessary continuances that are not inconsistent with the child's best interests, while giving 'substantial weight to a minor's need for prompt resolution of his or her custody status, the need to provide children with stable environments, and the damage to a minor of prolonged temporary placements.' (Welf. & Inst. Code, § 352, subd. (a); see *id.,* §§ 352, subd. (b), 366.26, subd. (c)(3) [limits on continuances]; [Cal. Rules of Court,] rule 5.550(a) [continuances in dependency proceedings].)" (*In re Abbigail A.* (2016) 1 Cal.5th 83, 95.)

"The court's denial of a request for continuance will not be overturned on appeal absent an abuse of discretion. [Citation.] Discretion is abused when a decision is arbitrary, capricious or patently absurd and results in a manifest miscarriage of justice. [Citation.]" (*In re Karla C.* (2003) 113 Cal.App.4th 166, 179-180.)

We find no abuse of discretion in the trial court's denial of mother's request for a continuance. As mother notes in her reply brief, the section 366.26 hearing had been continued several times before the January 13, 2016 date. Mother cites the prior continuances as a basis for her to reasonably believe the hearing could be continued one more time. We view the repeated prior continuances in a different light. Each prior continuance, granted at the behest of DCFS, and once at father's request due to his in-custody status, allowed mother additional time to prepare any evidence she wished to present to support her argument that an exception to termination of parental rights existed.

Indeed, in February 2015, nearly one year before the section 366.26 hearing finally went forward, mother filed a section 388 petition accompanied by a letter that expressed her desire not to have the siblings separated. As the court indicated at the hearing, the issue of the sibling relationship was not new in January 2016. In this light, the juvenile court could reasonably conclude mother did not establish good cause for a last-minute oral motion for a continuance, or to continue the proceedings. (*In re B.C.* (2011) 192 Cal.App.4th 129, 144 [statute and related court rule require notice of motion for continuance to be filed in writing at least two days before hearing unless court "for good cause" entertains oral motion].)

Mother had over a year to prepare for the section 366.26 hearing. Even if the early continuances suggested it was premature to subpoena witnesses for the hearing, the need to do so should have been apparent at least by December 1, 2015, when DCFS reported the adoption homestudy was completed and counsel set the matter for contest. Further, on January 11, 2016,

the hearing was briefly continued since father had not been brought out of custody for the hearing. Mother must have known then that if she wished to present evidence beyond her own testimony at the hearing, it was necessary to procure that evidence for the January 13, 2016 hearing. We must therefore reject mother's argument that the juvenile court's denial of her last-minute request for a continuance denied her a fair opportunity to defend her parental rights.

Moreover, the juvenile court could also reasonably conclude continuing the section 366.26 hearing was contrary to J.J.'s interests. The court was required to give weight to J.J.'s "need for prompt resolution of his . . . custody status," the need to provide him with a stable environment, and the damage to him of prolonged temporary placements. (§ 352, subd. (a).) J.J. was one year old when detained. He had been in a temporary placement for over two and a half years. The hearing for selection and implementation of a permanent plan had already been delayed for over a year. Mother was not responsible for these delays. But the juvenile court's focus was properly on J.J.'s interests when considering mother's continuance request. The juvenile court reasonably determined further continuing the hearing was not appropriate.

Finally, even if the juvenile court erred in denying mother's request for a continuance, we would find any error harmless. It is not reasonably probable that a result more favorable to mother would have been reached had the court granted a continuance. (*D.E. v. Superior Court* (2003) 111 Cal.App.4th 502, 513–514.) As discussed in greater detail below, to establish the sibling relationship exception to termination of parental rights, the parent must prove not only that a sibling relationship exists, but

also that the dependent child at issue would suffer detriment if the relationship is severed or substantially disrupted. To overcome the legislative preference for adoption, the parent must establish the detriment the child would suffer would outweigh the benefits the stability and permanence of adoption would provide. (*In re D.O.* (2016) 247 Cal.App.4th 166, 177 (*D.O.*).)

Here, it is undisputed that three-year-old J.J. had never lived with his sisters and only visited them one day every other weekend. It is not reasonably probable that even if the juvenile court granted mother's request for a continuance, enabling her to subpoena the maternal grandmother to testify, or to in some fashion introduce J.J.'s sisters' perspective into the proceedings, mother would have received a more favorable result.

II. Substantial Evidence Supported the Juvenile Court's Finding that the Section 366.26, subdivision (c)(1)(B)(v) Exception Did Not Apply

Mother asserts the evidence did not support the juvenile court's finding that the sibling relationship exception did not apply. We disagree.

" 'Adoption, where possible, is the permanent plan preferred by the Legislature.' [Citation.] If the court finds a child is likely to be adopted if parental rights are terminated, it must select adoption as the permanent plan unless it finds termination of parental rights would be detrimental to the minor under one of the specified exceptions. (§ 366.26, subd. (c)(1).) The parent has the burden to show termination would be detrimental to the minor under one of those exceptions. [Citation.]" (*In re Valerie A.* (2007) 152 Cal.App.4th 987, 997–998.)

Under section 366.26, subdivision (c)(1)(B)(v), the court may select a permanent plan other than adoption if it "finds a compelling reason for determining that termination would be detrimental to the child" because "[t]here would be substantial interference with a child's sibling relationship, taking into consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption."

"To the extent [mother] challenge[s] the juvenile court's ultimate determination, we apply the substantial evidence standard to the juvenile court's underlying factual determinations, and the abuse of discretion standard to the court's weighing of competing interests." (*D.O., supra*, 247 Cal.App.4th at p. 174.)

The record in this case amply supported the juvenile court's conclusion that the sibling relationship exception did not apply. Mother's uncontradicted testimony was that J.J. and his sisters had visits every other week and the siblings had a "close bond."[2]

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[2] Aside from mother's statements in the record and stipulated testimony, the record contained very little information about a relationship between J.J. and his siblings. In a December 2014 report, DCFS indicated: "Child is able to see his sisters and cousins, during mother's visits. Child enjoys going because it is like playtime for him." In a December 2015 report, DCFS noted: "While living with [paternal grandmother], [J.J.] is still able to visit with parents and family members from both

While it is unclear to what extent the siblings lived together before the dependency proceedings, it is undisputed that J.J. was detained when he was one year old and he had not lived with his sisters since. Even if mother's testimony was sufficient to indicate the existence of a sibling relationship, there was no evidence that the detriment to J.J. of severing the relationship would outweigh the benefits to him of the stability and permanence of adoption. (*In re I.R.* (2014) 226 Cal.App.4th 201, 214.)

Other courts have noted that when the sibling relationship exception was first introduced, the author of the legislation anticipated " 'use of the new [sibling relationship] exception "will likely be rare," ' meaning 'that the child's relationship with his or her siblings would rarely be sufficiently strong to outweigh the benefits of adoption.' [Citation.]" (*In re Daisy D.* (2006) 144 Cal.App.4th 287, 293.) Here, J.J. was an infant when he was removed from mother and he only visited with his sisters at most every other week. On the other hand, by the time of the section 366.26 hearing, J.J. had been living with the paternal grandmother for over two and a half years. He was happy and thriving in her care. There was no evidence the detriment J.J. might suffer if visits with his sisters "ceased presented a sufficiently compelling reason to forgo the stability and permanence of adoption by [a caretaker] to whom [he] was closely bonded." (*Ibid; D.O., supra*, 247 Cal.App.4th at p. 177; *In re D.M.* (2012) 205 Cal.App.4th 283, 293.) The juvenile court properly denied application of the sibling relationship exception to termination of parental rights.

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paternal and maternal sides. [J.J.] is observed to be happy and healthy living with [paternal grandmother]."

III. We Conditionally Reverse to Allow for Proper Notice Under ICWA

Mother contends, and DCFS concedes, that proper notice was not provided to two Indian tribes, as required under ICWA. We agree and remand for proper compliance with the law.

"ICWA was enacted to protect the rights of Indian children and tribes. [Citation.] ' "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.' [Citation.] Under ICWA, a party seeking foster care or termination of parental rights must notify an Indian child's tribe of the pending proceedings and of its right to intervene. [Citation.] The notice provision applies if 'the court knows or has reason to know that an Indian child is involved.' [Citation.] . . . [¶] If the notice duty is triggered under ICWA, the notice to a tribe must include a wide range of information about relatives, including grandparents and great-grandparents, to enable the tribe to properly identify the children's Indian ancestry. [Citation.] Any violation of this policy requires the appellate court to vacate the offending order and remand the matter for further proceedings consistent with ICWA requirements. [Citation.]" (*In re J.D.* (2010) 189 Cal.App.4th 118, 123-124.)

In this case, mother provided information indicating she had Cherokee heritage. The juvenile court ordered DCFS to give notice to the "Cherokee tribe." An initial set of notices contained errors in the names of J.J.'s relatives. DCFS sent new notices to only one tribe, the Cherokee Nation of Oklahoma. On appeal, DCFS concedes it failed to send a correct, accurate notice to two of the Cherokee tribes listed in the Federal Registry, and that

notice to those tribes was required, as well as notice to the Bureau of Indian Affairs and Secretary of the Interior. We agree.

"The social worker in a child dependency case is statutorily required to interview the child's parents and extended family members to gather the information required for the ICWA notice. (§ 224.3, subd. (c).) The notice must be sent by registered mail, with return receipt requested, to any tribe in which the child may be a member or eligible for membership, and no proceeding may be held until at least 10 days after receipt of the notice by the tribe or tribes. (25 U.S.C. § 1912(a); Welf. & Inst. Code, § 224.2, subds. (a)(1), (3), (d).)" (*In re I.B.* (2015) 239 Cal.App.4th 367, 376.) The Bureau of Indian Affairs and Secretary of the Interior must also be provided notice. (25 U.S.C. § 1912, subd. (a); § 224.2, subd. (a).)

Because proper notice was not provided to the Easter Band of Cherokee Indians, United Keetoowah Band of Cherokees, the Bureau of Indian Affairs, or the Secretary of the Interior, we conditionally reverse the order terminating mother's parental rights and remand to allow proper notice to be provided to those tribes and entities.

DISPOSITION

The order terminating mother's parental rights is conditionally reversed. The matter is remanded to the juvenile court with directions to order DCFS to provide the Easter Band of Cherokee Indians, United Keetoowah Band of Cherokees, the Bureau of Indian Affairs, and the Secretary of the Interior proper notice under ICWA. If the tribes indicate J.J. is not an Indian child, or if the tribes do not respond to the notice (§ 224.3, subd. (e)(3)), the juvenile court shall reinstate the order terminating parental rights. If it is determined J.J. is an Indian child, the juvenile court shall proceed in accordance with ICWA.

BIGELOW, P.J.

We concur:

FLIER, J.

GRIMES, J.